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WHAT, IF ANY, LIMITATIONS ARE THERE UPON THE POWER TO AMEND THE CONSTITUTION OF THE UNITED STATES?*

The answer to the above question would seem to be quite plain when we remember the explicit and unmistakable provisions of Article V of the Constitution, which, after stating the two methods through which the Constitution might be amended, provides: "That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate."

No other express limitation of amendment was placed in the Constitution by the "fathers," and one of those has now become obsolete by the lapse of time. Recently, however, the very novel doctrine, namely, that there is an implied limitation to the power of the people to amend the Constitution, has been advanced and pressed with considerable vigor, as propaganda in connection with certain interests as well as in the courts of our land. To most people, this implied limitation theory is an unheard-of contention, and will doubtless bring forth some interesting discussions.

One of the first principles, as it is one of the most sacred and solemn, held by the makers of the American Charter of human liberty to be "self-evident," is the right "to alter or to abolish" an oppressive government. After announcing that all mankind have "certain inalienable rights," they went on to declare, "that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Then they stated, as one of the most important means of maintaining those essential and inherent rights or truths, "that when-

*By George Washington Williams, of the Baltimore Bar.

ever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." To which, however, was added this judicious observation: "Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes."

A government may be changed, in a general sense, in one of two ways, namely, by revolution or evolution. The colonists had no means of evolution, therefore they resorted to revolution. Within the government they had no power but that of supplication; they had no means by which they could peaceably effect their wishes, consequently, when supplication failed, they had either to submit to continued wrongs, which their sensibilities would not permit, or to enter into rebellion against the government, which they did, as the only means of escaping virtual thraldom. When they, themselves, were put to the necessity of forming a plan of government, they realized the advisability of providing for a peaceful method of changing their "form of government," so they made provision therefor. In the Articles of Confederation, the plan for their amendment was so hard as to be almost impossible of accomplishment, as they required all proposed amendments to be "confirmed by the legislatures of every state." Recognizing the failure of that formula, they made a more liberal arrangement for amending the Constitution, nevertheless, leaving it quite sufficiently difficult to prevent the gratification of mere caprice in dealing with the organic law of the land. For a long time, it was considered next to impossible to amend it, and the present amendments have not been effected without a long and arduous effort or agitation.

Not to have arranged for changing the new government, in some reasonable way, when it, or some part of it, became obnoxious to the people, would have been a piece of presumption, or, to say the least, short-sightedness, on the part of the statesmen of that time. They surely did not think themselves so wise as to be able to establish a Constitution which would be the

best possible instrument of government for all time to come; therefore, they of course knew that—

> "New times demand new measures and new men;
> The world advances, and in time outgrows
> The laws that in our father's day were best;
> And, doubtless, after us, some purer scheme
> Will be shaped out by wiser men than we,
> Made wiser by the steady growth of truth."

They knew that they could not "bring Utopia at once," and they, therefore, made but two limitations, only one of which was intended to be enduring.

We therefore, learn from the Declaration of Independence, that we have an inherent right, an inalienable right, to "alter or to abolish" "any form of government" which "becomes destructive of" the fundamental human rights, which, in a general way, they enumerated to be the right to "life, liberty and the pursuit of happiness."

In fact, they were forced to take that position in justification of their own action in attempting to resist their then lawful government and upon an examination of the proposition they found that that was a right that inhered in all peoples and at all times, subject to the application of the wise precautionary observation above quoted. Since then at least, that principle has been accepted as axiomatic and therefore beyond dispute. Until the present day no question has ever been made of it in the courts, so far as I am aware. It is a right so completely left with the people that the President has no right to disapprove of any amendment that may be passed, even though it were to abolish his own office. He has nothing whatever to do with that power as it so peculiarly belongs to the great source of all government —the people, who reserved that control over their government as their ultimate means of self-defense.

Now, then, the proposition is stated that an amendment may be of such a nature as to be unconstitutional even though the requirements of Article V of the Constitution have been complied with, by which, so far as one can see from an examination of it, but two limitations are placed upon the power of amendment. Therefore, if other limitations exist, they must exist by

implication only, and this, even the proponents of this rather novel doctrine must admit.

There is nothing in the Constitution itself, from which such an inference may be drawn; therefore, they must go behind and beyond the Constitution to find the basis for, or means of, making that implication. Indeed, they must find somewhere—

> "Some mystic sentence written by a hand
> Such as of old did scare the Assyrian king,
> Girt with his satraps in the blazing feast."

There must be either a super-power to the Constitution, or some implied reservation of power, to sustain this new doctrine. There must be, then, an implied Tenth Amendment to the Constitution, reserving all fundamental elements (such, for instance as might be said to come under the natural laws) from the government and holding them as being sacred and non-delegable and inalienable.

According to such reasoning, Seward must have been right when he made the statement which caused quite an explosion and for which Pratt of Maryland threatened to move for his expulsion, which is as follows:

"The Constitution regulates our stewardship; the Constitution devotes the domain to union, to justice, to defense, to welfare, and to liberty. But there is a higher law than the Constitution which regulates our authority." And he indorsed Section 18 of the Liberty party platform of 1844, which declared: "It is a principle of universal morality that the moral laws of the Creator are paramount to all human laws." Nevertheless, he took care to remark that he would "adopt none but lawful, constitutional and peaceful means to secure even that end."

That declaration, however, is in accord with those made by celebrated Englishmen; for instance: John Milton, in his defense of the people of England, appealed to "that fundamental maxim in our law by which nothing is to be construed a law that is contrary to the law of God or of reason." Justice Herle said: "That some statutes are made against law and right, which when those who made them, perceiving, would not put them in execution" (Year Book Edward III, page 30). In another case, Lord Coke refused to enforce a statute "because it would be against common

right and reason," and, therefore "the common law judges the act of Parliament as on that point void" (53 Edward III). And Lord Holt is reported to have said: "What my Lord Coke said in Dr. Benham's case is far from any extravagance, for it is a very reasonable and true saying that if any act of Parliament shall ordain that the same person should be a party and judge, or, what is the same thing, judge in his own case, it would be a void act of Parliament." The exercise of such a power would be an extremely delicate matter, and, granting the existence of such a power, it should be resorted to only in the most extreme and aggravated case, or more harmful results might flow from an attempt to resist it than would arise out of the observance of the obnoxious law. The same danger does not exist with us, where everyone has a means of orderly expressing his judgment, as it does in some other countries, and as it existed in the Colonial days of America and in England when the king ruled "by the grace of God."

In this country, the people, of course, acknowledge no earthly superior. They are sovereign in themselves, having long since, through their ancestors, fought out that question of the divine right of kings. That question was finally disposed of in England, I think, when James II was forced from the throne. Therefore, the sovereign of America is the mass of citizens. Who can place any limitation upon the right of the people to do anything that they may be pleased to do—acting always, of course, in accordance with the prevailing constitutional requirements? Whence comes this power? Who is to pass on the question, if it is beyond the power of the people to do so? The people have heretofore protected themselves by and through revolution, whether it was recognized to be their right to do so makes little difference. The necessity of the occasion invented the remedy.

The fight between King John and the Barons, in its final analysis, involved this very question. It was the demand on the part of those people who were capable of self-government, to be allowed certain privileges and to be protected in certain rights without which no man could be called free; the granting of which, in such circumstances, implied the right to make further demands, and to have their granting not to depend upon the

caprice or the mere personal will of the king. This was, in practical effect, the power to amend or alter their government, only it was in a crude form, but nevertheless contained the germs of what has become one of the most enlightened systems of all times. To be sure, force was visible, but force, in one form or another, is, and must be, somewhere (even if away back in the distance) existent in all systems of government, as mortals are now constituted. The result of the revolution was the establishment, or, rather, the recognition, of certain primary rights of man, which were not to be removed by the development of civilization or the mutations of time, because they are indelibly "impressed in the nature of man."

The Constitution was bitterly assailed by some of the most patriotic citizens, because they wished to see a bill of rights in or attached to the Constitution, and, in disposing of that objection, Hamilton, in part, argued:

"It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was the Petition of Rights assented to by Charles I in the beginning of his reign. Such, also, was the Declaration of Rights presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations. 'We, the people of the United States, to secure the blessing of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America.' Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government." (The Federalist No. 64.)

The Constitution was intended to be a progressive document, for, having had so many difficulties (in fact, closely approaching the breaking point), the framers knew that they could be eradicated only by the process of time, through perfecting amendments. They knew, by bitter experience, that "to balance a large state," as said by Hume, "or society, whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason, and reflection, to effect it. The judgment of many unite in the work; experience must guide their labor; time must bring it to perfection, and the feeling of inconvenience must correct the mistakes which they inevitably fall into in their first trials and experiments."

The power to amend is the safety-valve to a nation, and is as necessary to the safety of a state as it is to a boiler. The check, or one check, to it, is the ultimate right to a revolution if it becomes intolerably oppressive and the oppression cannot be thrown off otherwise. Of course, if particular persons, or groups of persons, cannot effect their purposes and ideals through the regular and orderly methods and cannot tolerate the government as they find it, they always have the right to expatriate themselves. A great number of people have been doing this for many years, by coming to America, and they have the privilege to go back again, or to go somewhere else, if this country does not suit them, I am sure. Some of them we would wish godspeed!

So, according to republican principles, it would seem that there is, generally speaking, an unlimited right to amend the Constitution, subject to the check and privileges mentioned above and particularly recalled in the preceding paragraph, and with them Hamilton's argument would seem to be in entire accord.

But, say the advocates of this new doctrine, there would be no right, and there is no power, to so amend the Constitution as to change it in its fundamental elements and principles; that such amendments as are to be made must conform to the general scheme of our present form of government. On what principle of politics, philosophy or of the Constitution can they base such an argument in the face of the solemn pronouncements of the Declaration of Independence? Did not the "fa-

thers" thunder to King George, and to the world besides, that "it is the right of the people to alter or to abolish" their government? In fact, England has completely remodeled her government through peaceful and parliamentary processes, and who would be so bold as to proclaim, for the benefit of King George V, that the conversion of England into a democracy, which is a virtual dethroning of the king, was an unlawful and unconstitutional action and that he should, therefore, assert his right to rule the British Empire in his own right, as by the grace of God, and without reference to the wishes of the people. It would be as vain as the Pope's bull against the comet or Don Quixote's vagaries. Yet, such a contention is now actually being made in a most serious and solemn manner and with considerable confidence, and it has now actually reached the highest court in the land. Such an argument was made against the adoption of the Constitution. In the fortieth number of the Federalist, Madison discussed that objection, and in doing so asked this question: "Will it be said that the alterations ought not to have touched the substance of the Confederation?" And he answered his own question thus: "The States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some substantial reform had not been contemplated. Will it be said that the fundamental principles of the Confederation were not within the purview of the convention, and ought not to have been varied?" He then went on to argue at length in the tenor of the answer to the preceding question.

In dealing with this particular phase of the subject, Vattel, in his Law of Nations, page 10, discussing the general principles which should control the matter, said:

"There can be no difficulty in the case, if the whole nation be unanimously inclined to make this change. But it is asked, what is to be done if the people are divided? In the ordinary management of the state, the opinion of the majority must pass without dispute for that of the whole nation; otherwise it would be almost impossible for the society to take any resolution. It appears, then, by parity of reasoning, that a nation may change the constitution of the state by a majority of votes * * *.

But if the question be, to quit a form of government, to which it appeared that the people were willing to submit on their entering into the bonds of society—if the greater part of free people, after the example of the Jews in the time of Samuel, are weary of liberty, and resolved to submit to the authority of a monarch—those citizens who are more jealous of that privilege, so invaluable to those who have tasted it, though obliged to suffer the majority to do as they please, are under no obligation at all to submit to the new government: they may quit a society which seems to have dissolved itself in order to unite again under another form: they have a right to retire elsewhere, to sell their lands, and take with them all their effects."

We may ask, how else, that is, on what other principle, may a government be operated in an harmonious manner? That author said, further, that he could find no authority for "a few malcontents or incendiaries to give disturbance to their" government "by exciting murmurs and seditions." It would be well if certain elements were to take notice of that observation, and govern themselves accordingly, if they have any regard for the tranquility of our nation.

We cannot banish from our mind the fact that our own Government was a change from the preceding form and in fundamental respect, too. The former was a confederate form, whereas ours is a national form of government, and the change was then ably justified of the most able and learned of our early statesmen (of course, it was opposed by a few), and has been completely vindicated by time. "Is it not the glory of the people of America, that, whilst they have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience? To this manly spirit posterity will be indebted for the possession, and the world for the example, of the numerous innovations displayed on the American theatre." Did they think that posterity would possess a less "manly spirit" than they themselves possessed, and should be bound by "blind veneration for antiquity, for custom, or for names," or did they

act with due regard for the wisdom of the generations and ages to come? The fifth article answers that question. A wise one amongst them said: "There ought to be a capacity to provide for future contingencies as they may happen, and as these are illimitable in their nature, it is impossible safely to limit that capacity."

Our forefathers were more respectful of posterity than was Lycurgus of his, when he established his government for Sparta. He adjured them never to alter it and sacrificed his life, we are told, in order to make the obligation more solemn and binding. Permanence may be well for a time, but it cannot apply to eternity. Conditions on this sphere we are admonished, must change; they must go either forward or backward, but, at any rate, they must change, and governments are no exception to the rule. "Happily for America, happily, we trust, for the whole human race, they pursued a new and more noble course," said Madison, because "they accomplished a revolution which has no parallel in the annals of human history." And they, assuredly, provided means for posterity to accomplish a revolution, in peace and by orderly processes, and they knew that if such a provision was not made, that the United States might long ere this "have been numbered among the melancholy victims" of sanguinary conflicts.

We cannot forget that there were some members of that convention who quite agreed with Vattel, who, in speaking of the English government, exclaimed: "Happy constitution! which they did not suddenly obtain; it has cost rivers of blood; but they have not purchased it too dear. May luxury, that pest so fatal to the manly and patriotic virtues, that minister of corruption so dangerous to liberty, never overthrow a monument that does so much honor to human nature—a monument capable of teaching kings how glorious it is to rule a free people!" They worshiped no particular form of government, but were bent on creating one that would suffice for the time, what that form would be within the range of governments from monarchical to democracy in its purest sense they did not care. They were after a government which would take care of their needs, and they were not concerned with forms merely. There were others,

of course, who were equally attached to a republican form, and others, yet, who preferred a confederation, and so on; and, at one time their views so widely differed that one member actually argued that the convention should be adjourned, and a great many of the members doubted the permanency of the Constitution as it then stood; and it, therefore, cannot be argued that they intended to close the door to any amendment that might be proposed.

In discussing the general principles in reference to amendments or alterations of government, either Hamilton or Madison said: "The important distinction so well understood in America, between a Constitution established by the people and unalterable by the government, and a law established by the government and alterable by the government, seems to have been little understood and less observed in any other country. Wherever the supreme power of legislation has resided, has been supposed to reside also a full power to change the form of the government. Even in Great Britain, where the principles of political and civil liberty have been most discussed, and where we hear most of the rights of the Constitution, it is maintained that the authority of the Parliament is transcendent and uncontrollable, as well with regard to the Constitution as to the ordinary objects of legislative provision. They have accordingly, in several instances, actually changed, by legislative acts some of the most fundamental articles of the government." And yet they say that we are limited in our right to abolish or to alter our government in any fundamental elements.

To be sure, it should not be changed for light or transient causes, but when weighty and permanent reasons appear, "veneration for antiquity" should not be conclusive against them.

It has been wisely said, that, "In disquisitions of every kind, there are certain primary truths, or first principles, upon which all subsequent reasonings must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims

of geometry, that the whole is greater than its part; things equal to the same thing are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other. Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of power destined to effect a purpose which is itself incapable of limitation." The professed object of the Constitution, and all governments, is to promote the happiness of its people, and no limitation should be placed upon their right, as the great dial hand that marks the destined progress of the world in the eternal round from wisdom on to higher wisdom" points out new means and methods, to continually endeavor to profit by experience.

We must not contract our intellect and narrow our vision so far as not to know—as Lowell has so nicely put it—that—

> "All things are circular; the Past
> Was given us to make the Future great;
> And the void Future shall at last
> Be the strong rudder of an after fate."

Or, as another poet put it—

> "The best is yet to be, the last,
> For which the first was made."

It now sounds like sacrilege (but it is true), to say, that the Constitution was not looked upon by all of the people or of the framers of it, as being the perfect document (in the human sense of the term), which it has since been regarded and proven to be, and it cannot therefore be said that the framers intended that we should abide by the fundamental principles thereof, forever and a day. They certainly had no such intention; there is certainly nothing from which such a conclusion could be drawn, and, in fact, such was not the case, notwithstanding the arguments of the devotees of the Constitution from the North. When we listen to their plaintive wails and recall to mind their conduct of some sixty years ago, we find no difficulty in discounting their sincerity. If they had been as devoted

to states' rights then as they now profess to be, they might have saved the shedding of a lot of precious blood. Such arguments do not have the right ring and will find no echo in the Supreme Court of the United States.

When the provision for amendment was prepared it was understood that there might be difficulty with some obstreperous or contumacious member. Hamilton, after saying that the article speaks for itself, went on to say, that, "To have required the unanimous ratification of the thirteen States would have subjected the essential interests of the whole to the caprice or corruption of a single member." Whereupon he declared that, "it would have marked a want of foresight in the convention which our own experience would have rendered inexcusable." He knew, and they all knew, that at some crucial moment some insignificant member would probably assume an unwarranted self-importance and jeopardise the interests of the whole, and this they thought they were rendering impossible when they substituted the present for the former method of amending the organic law of the land.

The peculiar thing about the proponents of this new doctrine is, that they both stand on and reject the Constitution. In one breath they say that it is so sacred that the fundamental principles may not be interfered with and in the next that the Fifth Article is to be ignored, or is to be recognized only to a limited extent, when they must know that that article is the very ground upon which we must stand to argue against the Bolshevists and Socialists and other factious elements who threaten to convulse the country and ultimately to throw it into a physical revolution. That article, in its full limit and virility, will probably prove to be the salvation of the country in years to come. The power of amendment must be regarded as one of the fundamental principles, as it in fact is. It is absolutely indispensable.

By their attitude before and during the Civil War the Northern States are absolutely precluded from harking back to the Kentucky and Virginia resolutions against the Alien and Sedition Law enacted in 1798. They have no regard for consistency and must think, if they hope to win both ways, that history is either dead or forgotten—they shall know that it is neither dead

nor forgotten. Then, shall we hear anything of secession? Our answer is, that "chickens come home to roost," and roost they will, if my judgment is not very bad. This belated appeal is against precedent and against reason, and is as much against reason as it is belated. By disregarding the function of the Fifth Article a physical revolution was provoked, the very thing that it was designed to prevent. By it reason is appealed to and brute strength eschewed. In our appeal for law and order let us not forget or abuse the very means by which they may best be maintained in the future.

These remarks are intended to go only to the power of amendment, and not to the expediency of making any particular amendment.

After this period of unbridled license, begotten by conditions which seemingly unavoidably attend upon war, the people will be willing, or more willing at least, to restrain themselves within due and reasonable bounds, and the great people who are advancing these arguments of last resort, when no occasion for last resort measures exists, would be doing the country a service if they were helping to allay this agitation rather than in fanning it. A great many of the agitators are agitating, doubtless, from prejudice or interest or both; however, there are many who no doubt believe what they are doing is right and proper—but they ought to take another thought, if they are as sincerely attached to the Constitution as they profess and ought to be. The people should be taught to defend rather than to circumvent the Constitution.